No. 78-1857

In the Supreme Court of the United States

OCTOBER TERM, 1978

DOMINIC BLASI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-6a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1979. The petition for a writ of certiorari was filed on June 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a witness before a grand jury has a right under the Fifth or Sixth Amendment to have counsel accompany him into the grand jury room.

2. Whether use and derivative use immunity granted pursuant to 18 U.S.C. 6002 and 6003 is co-extensive with the scope of the privilege against self-incrimination guaranteed by the Fifth Amendment and is therefore sufficient to compel testimony over a claim of privilege.

3. Whether the procedures followed by the district court in holding petitioner in civil contempt were adequate.

STATEMENT

On October 25, 1978, petitioner was summoned to testify before a federal grand jury in the Northern District of Illinois that was conducting an investigation into alleged racketeering activities in violation of 18 U.S.C. 1962. Petitioner asserted his Fifth Amendment privilege against compulsory self-incrimination and refused to answer any questions (Tr. 3).[1] On the morning of January 31, 1979, petitioner was granted immunity under 18 U.S.C. 6002 and 6003 (Tr. 10-11). That same day, when petitioner appeared before the grand jury, he again asserted his privilege against compulsory self-incrimination and refused to answer any questions (Tr. 17). Later that afternoon, the prosecutor orally petitioned the district court for a rule to show cause why petitioner should not be held in civil contempt (Tr. 17-18). The court granted the show cause petition, ordered that a written petition be filed, and set a hearing on the petition for the morning of February 7, 1979, the day on which the grand jury was to return (Tr. 18-19).

On February 6, 1979, four days after the government filed its written petition for a show cause order and six

[1] "Tr." refers to the transcript of proceedings before the district court on January 31, 1979, and February 6, 9 and 14, 1979.

days after the court granted the government's oral petition, counsel for petitioner requested a continuance of the contempt hearing (Tr. 24). The court directed counsel to file a written response to the contempt petition by February 8, 1979, and announced its intention to determine on the basis of the petition and response whether a full evidentiary hearing on the defenses raised by petitioner would be necessary (Tr. 36-37).

In his response, petitioner challenged the constitutionality of the immunity statutes and asserted that he had been denied his constitutional right to the assistance of counsel in the grand jury room (see Pet. 5-6). The contempt hearing resumed on February 9, 1979. The district court observed (Tr. 41) that the constitutionality of the immunity statutes had already been sustained by this Court. Accordingly, after hearing petitioner's proffer of testimony and arguments of counsel, the court held that no issue requiring a full hearing had been presented (Tr. 41-51). The court several times stressed that petitioner did not argue that the trauma of testifying under an immunity grant would have any unique impact on him, an issue on which the court was prepared to hold a full evidentiary hearing (Tr. 43, 48, 50, 59). Petitioner was ordered to reappear before the grand jury on February 14, 1979, to be given another opportunity to testify (Tr. 51-52).

On that date, petitioner appeared before the grand jury for the third time and continued to assert his Fifth Amendment privilege (Tr. 55). Petitioner then appeared before the district court and renewed his request for a plenary hearing on his asserted defenses (Tr. 56-59), which the court denied (Tr. 59). The questions petitioner had refused to answer were read into the record (Tr. 63-67). After petitioner declined a final opportunity to testify, the

court adjudged him in civil contempt and committed him to the custody of the United States Marshal until he obeyed the order to testify or until the grand jury discontinued its investigation (Pet. App. 1a; Tr. 67-68).

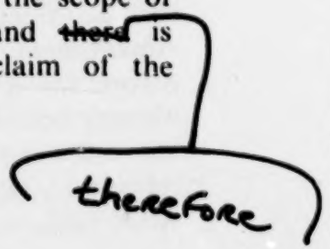
ARGUMENT

1. Petitioner's argument (Pet. 16-22) that he had a constitutional right to the presence of counsel in the grand jury room was properly rejected by the court of appeals. As the court noted (Pet. App. 5a-6a):

> Four members of the Court have held that the constitutional right to counsel is not implicated by grand jury proceedings, *United States* v. *Mandujano*, 425 U.S. 564, 581 (1976), while a fifth had suggested only that there is a constitutionally derived right to have counsel present for consultation outside the grand jury room. *Id.* at 608 (Brennan, J., concurring). In this case [petitioner] was given the opportunity to consult with counsel outside the grand jury room at any time. Accordingly, we find no constitutional error.

See also *In re Groban*, 352 U.S. 330, 333 (1957).

2. Similarly, petitioner's contention (Pet. 12-16) that the immunity granted by 18 U.S.C. 6002 and 6003 is not sufficient to supplant the Fifth Amendment privilege is foreclosed by *Kastigar* v. *United States*, 406 U.S. 441 (1972), in which the Court held that "such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and ~~there~~ is sufficient to compel testimony over a claim of the privilege." *Id.* at 453.



Congress has carved out of the use immunity provision in 18 U.S.C. 6002 an exception permitting the use of compelled testimony or information in "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." The constitutionality of this exception cannot be doubted. "[I]t cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful." *Glickstein* v. *United States*, 222 U.S. 139, 142 (1911), quoted in *United States* v. *Mandujano*, 425 U.S. 564, 578 (1976) (plurality opinion). See also *id.* at 584-585 (Brennan, J., concurring); *id.* at 609 (Stewart, J., concurring). *United States* v. *Wong*, 431 U.S. 174, 178 (1977).

Nevertheless, petitioner maintains that he should have been permitted to introduce evidence at his contempt hearing to demonstrate that use and derivative use immunity is not in fact co-extensive with the rights guaranteed by the Fifth Amendment because of the possible use in a subsequent perjury or false statement prosecution of testimony or information furnished under a grant of immunity. Petitioner argues that testimony before a grand jury is necessarily based on the witness' memory and powers of observation, which are in turn dependent upon a number of variables in the mental process and which are subject to subconscious distortion deriving from the emotional needs of the individual in question. Thus, because a witness before a grand jury is under great tension, anxiety, and stress, he might be led to answer a question honestly as he remembered, but nevertheless, incorrectly. Petitioner concludes that the risk that a witness might subsequently be subject to prosecution for perjury, even though he did not intentionally answer the questions falsely, renders the immunity insufficient to supplant the Fifth Amendment privilege (Pet. 14).

Petitioner's contention is, as explained above, foreclosed by the holding in *Glickstein* that a witness testifying under a grant of immunity may be prosecuted for perjury. The result in *Glickstein* was not based, as petitioner appears to suggest (Pet. 13, 15), on the Court's impressions or factual assumptions about the pressures to which grand jury witnesses are generally subject and their likely reaction to those pressures. It was based instead on the recognized need of the government to compel testimony in certain circumstances (222 U.S. at 141) and the conclusion that "an authority which can only extend to the licensing of perjury is not a power to compel the giving of testimony. Of course, these propositions being true, it is also true that the immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury." *Id.* at 142. The district court therefore correctly concluded (Tr. 41) that petitioner's argument has been "preempted" by this Court's decisions[2] and properly declined to permit petitioner the opportunity to present evidence to establish the factual premises for that argument.[3]

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[2]The proper occasion for a witness to raise the argument that the pressures of a grand jury appearance may lead to unintentional false statements would be in connection with a subsequent prosecution for perjury, not in seeking to avoid testifying altogether. *In re Grand Jury Proceedings*, 539 F. 2d 382, 384 (5th Cir. 1976).

[3]Moreover, although the district court observed that petitioner's claim had been "preempted" by this Court, it allowed petitioner to proffer testimony of what he sought to show in this connection, *i.e.*, that the psychological stress upon a witness was such that it could adversely affect his memory and ability to tell the truth, perhaps causing him to testify falsely and thereby to subject himself to a perjury prosecution (Tr. 41-51; Pet. 13-14). The court took judicial notice (Tr. 41-42) of the psychological impact of testifying upon a grand jury witness and again concluded (Tr. 58-59) that its decision would remain unaltered.

3. There also is no merit to petitioner's assertion (Pet. 8-11) that the district court deprived him of due process in holding him in contempt. Under 28 U.S.C. 1826, a district court may adjudge in contempt a witness who refuses "without just cause shown to comply with an order of the court." The witness must be given notice and "the opportunity of presenting all defenses properly available to him." *In re Grand Jury Investigation*, 545 F. 2d 385, 388 (3d Cir. 1976), quoting *In re Grand Jury Investigation* (*Schofield I*), 486 F. 2d 85, 91 (3d Cir. 1973). See also *United States* v. *Alter*, 482 F. 2d 1016, 1023-1024 (9th Cir. 1973). As explained above, petitioner's asserted defenses of the right to presence of counsel in the grand jury room and the unconstitutionality of the immunity statutes were not "available to him."

Contrary to petitioner's contention, a plenary hearing is not always warranted. Rather "[t]he test is whether [the witness] had an adequate opportunity to raise his claims and have them determined by the court." *In re Bonk*, 527 F. 2d 120, 127 (7th Cir.), stay denied, 423 U.S. 942 (1975); *In re Sadin*, 509 F. 2d 1252, 1255-1256 (2d Cir. 1975). In the present case, a period of eight days elapsed between January 31, 1979, the date on which the district court granted the government's petition for a rule to show cause why petitioner should not be held in contempt, and February 8, 1979, when petitioner filed his response to the petition. This period of time is certainly reasonable for the preparation of a defense. See *In re Weeks*, 570 F. 2d 244, 247 (8th Cir. 1978), and cases cited. Petitioner was given an opportunity to raise and did raise his defenses, but the court correctly rejected them as a matter of law. The hearing afforded petitioner thus was sufficient to satisfy due process. See *In re Grand Jury Proceedings*, 550 F. 2d 1240, 1242-1243 (3d Cir. 1977); *In re Sadin*, *supra*, 509 F. 2d at 1256; cf. *United States* v. *Alter*, *supra*, 482 F. 2d at 1023-1024.

Petitioner relies in part on *United States* v. *Dinsio*, 468 F. 2d 1392 (9th Cir. 1972), for the proposition that he was entitled to a full evidentiary hearing. That case, however, is inapposite. The defendant in *Dinsio* was held in contempt for refusing to provide finger and palm print exemplars to the grand jury. The prosecutor submitted *in camera* an affidavit of an FBI agent to show that the grand jury request was reasonable. No hearing was held and defense counsel was denied the opportunity both to inspect the affidavit and examine the affiant. In those circumstances, the court held that the witness was entitled to an "uninhibited and adversary hearing" in order to show "just cause." Here, there are no factual issues in dispute regarding any "just cause" for petitioner's failure to testify. Moreover, the correctness of the *Dinsio* decision has been questioned in a later decision by the Ninth Circuit. *In re Braughton*, 520 F. 2d 765, 767 (1975).

Petitioner also cites *In re Sadin, supra,* for the proposition that he was entitled to a hearing and that there is a conflict among the circuits regarding the rights of potential contemnors (Pet. 11). However, that case merely held that the recalcitrant witness has a right to a reasonable time within which to prepare a defense. It did not suggest that a full evidentiary hearing is required where the defenses raised are without merit as a matter of law. See 509 F. 2d at 1256.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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